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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-481

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK and ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

against

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, *et ano.*,

Intervenors

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR INTERVENOR, POWER AUTHORITY OF THE STATE OF NEW YORK, IN OPPOSITION

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February 6, 1978

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Statement

On January 17, 1978 the Solicitor General filed a brief on behalf of the Federal Energy Regulatory Commission

(FERC) in response to the petition for a writ of certiorari in the above entitled proceeding.*

In its brief the FERC has taken a legal position different from that of its predecessor agency the Federal Power Commission (FPC) with respect to its authority to expend its funds to reimburse intervenors for attorneys' fees in proceedings before it. Consequently, it has requested that this Court grant the petition for a writ of certiorari, vacate the judgment of the court below and remand the case to the court of appeals for reconsideration in the light of the new position taken by the FERC.

As was pointed out by Intervenor, Power Authority of the State of New York, in its main brief in opposition to the petition for a writ of certiorari herein, the present action is the third case to go through the federal courts arising out of the FPC's consideration of Power Authority's Gilboa-Leeds transmission line and the second of such actions which has come before this Court on petition for a writ of certiorari (Br. in Opp., pp. 3-7). *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.) *cert. denied*, 409 U.S. 849 (1972) (*Greene County I*); *Greene County Planning Board* v. *FPC*, 490 F.2d 256 (2d Cir. 1973) (*Greene County II*); *Greene County Planning Board* v. *FPC*, 559 F.2d 1227 (2d Cir. 1977) (*Greene County III*, the

* The Federal Energy Regulatory Commission is the successor agency to the Federal Power Commission, respondent below, and is authorized to be substituted for the Federal Power Commission in this litigation by the provisions of Section 705 of the Department of Energy Organization Act, 91 Stat. 565. Under that Act the FERC has assumed most of the functions of the former Federal Power Commission, including jurisdiction over the licensing of certain electric transmission lines under Section 4 of the Federal Power Act (16 U.S.C. 797) which is the subject of this litigation.

instant litigation). The FERC now asks this Court to remand this case to the court of appeals to be relitigated once again.

Power Authority submits herewith its response in opposition to the brief for the Federal Energy Regulatory Commission.

Discussion

Neither the new position ostensibly taken by the FERC nor the fact that it is a legally separate entity created to carry out the same powers and functions of the former FPC changes in any respect the legal principles involved which compelled the court of appeals to hold that the then Federal Power Commission did not have legal authority to reimburse intervenors in proceedings before it for their attorneys' fees.

The court of appeals held that absent a clear statutory authority or congressional mandate, FPC is not authorized to make any award of counsel fees to intervenors. The fact that the Comptroller General or the FERC may decide or opine that the award of such fees is either necessary or proper does not provide the necessary congressional mandate and statutory authority which is required by the well settled "American Rule" that absent an enforceable contract providing otherwise litigants must pay their own counsel fees. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *Turner* v. *Federal Communication Commission*, 514 F.2d 1354 (D.C. Cir. 1975); *FitzGerald* v. *U.S. Civil Service Commission*, 554 F.2d 1186 (D.C. Cir. 1977).

Nothing raised in the FERC's brief justifies a rejection of the well settled "American Rule."

The Solicitor's brief suggests that the new position of the FERC creates a "reasonable possibility that the court of appeals would view the matter differently in light of the view held by the new Commission . . ." (FERC Br. at 7). There is no valid basis for this conclusion. The court of appeals decided the issues below solely on the basis of well established law and not upon the Commission's determination as to its permissible action. The two interpretations just happened to coincide. Now the FERC has interpreted the same statutes which were interpreted by its predecessor and has reached a different conclusion. It has neither stated a basis for such a dramatic reversal in position, nor has it demonstrated why the position of the FPC and the decision of the court of appeals are erroneous. Nothing in the Commission's alleged new position changes the law as stated by the court of appeals that the FPC had no legal statutory authority to award intervenors' counsel fees and no intervening statutory authority enlarges the power of its successor agency with respect to this issue.

The government's brief also suggests that the court of appeals may view the matter differently since it may have been influenced by the fact that the FPC had allegedly "'never deemed itself authorized' to award compensation for attorneys' fees, and on the principle that '[t]his interpretation of the Federal Power Act by the agency charged with its administration is entitled to great deference from this Court' (Pet. App. pp. 4a-5a, N.2)." (FERC Br. at 17).

The quoted material in the government's brief is contained in a footnote used by the majority below to illustrate the difference of opinion concerning the appropriateness of awarding counsel fees between the Comptroller General and the then FPC.

The majority held that the court's interpretation of the Federal Power Act must control and the court held that "the Federal Power Commission has no statutory authority to make the disbursements in question" (Pet. App. at 5a). The holding of the court below was based solely on the lack of statutory authority for the FPC to reimburse intervenors absent a clear congressional mandate. The court of appeals did not base its determination upon a factual question of whether the FPC had determined it had the authority to award counsels' fees.

The FPC's opinion of its own powers is irrelevant in light of the decision of the court of appeals based upon the court's interpretation of the statute. As this Court has held, despite what an administrative agency may decide in interpreting its own statute, the courts are the final authorities on issues of statutory construction. *FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374, 385 (1965); *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965); *Zuber* v. *Allen*, 396 U.S. 168, 192-193 (1969); *Volkswagenwerk Aktiengesellschaft* v. *F.M.C.*, 390 U.S. 261, 272 (1968). *See, Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726 (1973). An administrative interpretation, such as the new interpretation of the statutes by the FERC, must fall where clearly unsanctioned by law or in conflict with judicial decision. *Jewel Ridge Coal Corp.* v. *Local No. 6167*, 325 U.S. 161, 169 (1945); *Neuberger* v. *Commission*, 311 U.S. 83, 88-89 (1940).

The FERC cites no cases from any other circuit court, nor has the Power Authority found any such decisions, which conflict with the lower court's decision and which might warrant further review of the much-litigated issues involved in this action.

Conclusion

It is consequently not necessary to give the court below an opportunity to consider the issues in the "new light" of the changed position of the FERC and for the reasons stated above, the petition for certiorari should be denied in all respects or in the alternative the decision of the court of appeals sitting *en banc* should be summarily affirmed.

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amicus brief

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POWER AUTHORITY OF THE STATE OF NEW YORK, ET ANO., *Intervenors*.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pacific Legal Foundation hereby respectfully moves pursuant to this Court's Rule 42 for leave to file its brief *amicus curiae* in opposition to the petition for a writ of certiorari. Consent was sought from all parties. The Federal Energy Regulatory Commission, formerly the Federal Power Commission, and the Power Authority of the State of New York gave their

consent to the filing of this brief. The petitioners did not. All of these documents have been filed with the Clerk.

The accompanying brief urges this Court to deny the petition for a writ of certiorari to the United States Court of Appeals in the matter of *Greene County Planning Board, et al.* v. *Federal Power Commission, et al.*, No. 77-481.

Pacific Legal Foundation is a non-profit, tax exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens. The Board evaluates the merits of any contemplated legal action and authorizes such legal action when the Foundation's position has broad support within the general community. The Board of Trustees, upon evaluation of this matter, has determined that substantial questions affecting the public interest are involved here and has approved of the Foundation's filing a brief in opposition to the petition for certiorari.

The Foundation, as a public interest organization, essentially favors public participation in administrative proceedings. Moreover, because the Foundation frequently participates in agency proceedings, it stands to benefit financially from the use of government funds to pay for public participation. However, absent clear statutory authority, agencies cannot use federal funds to compensate voluntary intervenors. To do so would represent an improper expenditure of federal funds. Such an expenditure would reflect a

subsidization of particular points of view, an action without statutory authorization by Congress.

Over 20,000 individuals, directly or through associations and firms, support the Foundation's activities. As citizens and taxpayers they have a deep concern about the expenditure of federal monies according to the law. These individuals compose a public that is just as affected by this litigation as the petitioners in this case. The Foundation, moreover, has filed extensive written comments on this issue with federal agencies. It also filed a brief *amicus curiae* with the Second Circuit Court of Appeals in this case. For these reasons, and because Pacific Legal Foundation is an active public interest organization which stands to benefit financially from the position advocated by the petitioners, the Foundation's participation will assist the Court in giving full consideration to opposing public interest viewpoints on the issues presented in this case.

Accordingly, Pacific Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

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INTEREST OF AMICUS

Pacific Legal Foundation is a non-profit, tax exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. The background and interests of the *amicus* are detailed in the preceding motion for leave to file this brief.

ARGUMENT

I. The Court of Appeals Correctly Held That the Authority To Subsidize Particular Points of View Must Come From Congress.

The Administrative Procedures Act provides that "[t]o the extent necessary to decision . . . the reviewing court shall decide all relevant questions of law" and shall "hold unlawful and set aside agency action in excess of statutory jurisdiction, authority, or limitations . . . ." 5 U.S.C. § 706 (Supp. V, 1970). *See also Mulry* v. *Driver,* 366 F.2d 544, 549 (9th Cir. 1966). In the exercise of this authority, the Second Circuit ruled that the Federal Power Commission did not have statutory authority to use federal funds to pay the petitioner intervenors, and in so doing overruled the opinions of the Comptroller-General.

Opinions of the Comptroller-General are not immune to being overturned by the courts. In *United States* v. *Stewart,* 234 F. Supp. 94 (D.D.C. 1964), *aff'd,* 339 F.2d 753 (D.C. Cir. 1964), the district court stated:

> The Comptroller General is *not* a law officer. He does not render legal opinions . . . . Technically a decision of the Comptroller General upon a question so submitted to him, is not a legal opinion, but a ruling or an announcement that if certain payments were made by disbursing officers in the future, they would be passed or disallowed.

234 F. Supp. 94, 100 (emphasis added). A commitment given by the Comptroller-General in response to such an agency request operates as a form of estoppel against a subsequent challenge by the Government Accounting Office (GAO), but his actions do not operate as a legal or judicial determination of the rights of the parties. *Wheelabrator Corp.* v. *Chafee,* 455 F.2d 1306, 1313

(D.C. Cir. 1971); *Curtis Wright Corp.* v. *McLucas,* 381 F. Supp. 657, 659 n.2 (D.N.J. 1974). The courts, however, have not hesitated to reverse his opinions, even those falling within his historical areas of expertise. *Keco Industries, Inc.* v. *Laird,* 318 F. Supp. 1361, 1363 (D.D.C. 1970).

The opinion of the Court of Appeals, indeed, reinforces the present state of the law. Absent clear statutory authority, opinions of the Comptroller-General cannot furnish a basis for disbursing public funds to voluntary intervenors in agency proceedings. Authorization for such payments must come from Congress. *Turner* v. *FCC,* 514 F.2d 1354 (D.C. Cir. 1975). In *Turner,* the plaintiffs sought reimbursement for legal expenses incurred as a result of their participation in proceedings before the Federal Communications Commission. The District of Columbia Circuit considered the Supreme Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), and ruled that the reasoning of the Supreme Court was applicable to the proceedings before the Federal Communications Commission. The court held that without statutory authority the FCC could not reimburse the plaintiffs. The court reached the same conclusion in *Fitzgerald* v. *United States Civil Service Commission,* 554 F.2d 1186 (D.C. Cir. 1977), when it reversed a district court decision that the Civil Service Commission had authority to reimburse a participant for legal fees in proceedings before it. The court stated:

> The import of *Alyeska* . . . , we believe, is that a general waiver of sovereign immunity should not be construed to extend to attorney's fees unless Congress has clearly indicated that it should.

554 F.2d 1186, 1189.

This same opinion has been expressed in other judicial holdings. The Fourth Circuit held that *Alyeska* "specifically recognized that it was for Congress to select, by statutory authorization, those types of actions in which attorneys's fees should be awarded." *Lytle* v. *Commission of Elections,* 541 F.2d 421, 424 (4th Cir. 1976). In *Trapp* v. *United States* (10th Cir. No. 76-1801, unreported opinion decided Jan. 26, 1977), the court of appeals stated that where Congress has authorized an agency to award attorneys's fees it has done so "in no uncertain terms" (sl. op. at 4). In contrast, the Comptroller-General relies on vague generalities regarding statutory authority to justify his opinion. In *Fischer* v. *United States Department of Transportation,* 430 F. Supp. 1349, 1352 (D. Mass. 1977), the court would not do "by forced construction what Congress could have done in a specific statute."

The petitioners seek to distinguish this case from the principle laid down in *Aleyska* through a tortuous argument that reimbursement here is different because it involves no exercise of compulsion against a private party. This argument is disingenuous at best. In order to pay the costs of voluntary intervenors, the FPC may have to use money from the licensees, because Congress has not appropriated any separate funds for such purposes as reimbursing the petitioners. The licensee may be compelled to pay these fees through higher charges. Petitioners claim that the cost of providing fees to intervenors would be *de minimis,* although they admit that the true cost of such a venture is "unknown." Yet if the agency did not have sufficient funds to reimburse intervenors it may well need to increase its statutory charges. What may start out as *"de minimis"* could easily become a burden to both licensees and other ap-

plicants. The result would be the same as that prohibited by *Alyeska;* the fee is shifted no matter how convoluted the reasoning.

Petitioners seem to believe that by citing extensive agency *proposals* for rulemaking to reimburse intervenors (while apparently overlooking the unanimity found in the courts in the opinions cited above) they will add weight to their plea. How extensive citations of agency proposals legitimize their position or those opinions of the Comptroller-General remains a mystery.

II. Congress Has Chosen Not To Provide General Authority To Use Public Funds To Reimburse Intervenors in These Agency Proceedings.

Only Congress may authorize the expenditure of federal funds, and the release of such funds shall be applied solely to the objects for which they are respectively made and no others. Article IV, § 3, Cl.2 is a constitutional power lodged squarely with Congress. Subordinate officers of the United States are without that power. *Royal Indemnity Co.* v. *United States,* 313 U.S. 289, 294 (1941). Officers and employees of the government are prohibited from involving the government in any obligation for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such federal obligation is authorized by 31 U.S.C. § 665(a) (1970).

Congress has passed specific legislation authorizing reimbursements, along with the necessary appropriations, when it desired to reimburse participants in agency proceedings. Examples of such congressional action are: §§ 6(c)(4) and 29 of the Toxic Substances Control Act, Pub. L. No. 94-469, October 11, 1976, 90 Stat. 2003, *amending* 15 U.S.C.A. §§ 2605(c)(4) and

2628 (Supp. 1977); §§ 202(a)"(h)" and 207 of the Magnuson-Moss Warranty - FTC Improvement Act, Pub. L. No. 93-637, January 4, 1975, 88 Stat. 2183, *amending* 15 U.S.C. §§ 57a(h) and 57c (Supp. IV, 1974). In this last instance, the Comptroller-General had previously ruled that the FTC had the authority to pay voluntary intervenors' costs. In spite of his opinion, Congress passed the bill. During its recent session Congress has had three bills before it regarding reimbursement for voluntary intervenors in administrative proceedings. They are collectively identified as "Public Participation in Federal Agency Procedures Act", S. 270, 95th Cong., 1st Sess. (1977); H.R. 3361 and 3362, 95th Cong., 1st Sess. (1977).

Congress has the institutional role of resolving the question of the allocation of federal funds. The allocation of funds to voluntary intervenors in agency proceedings will provide in essence for the use of public funds to support a private or limited viewpoint, as Chief Judge Kaufman pointed out in the decision below:

> The decision whether to expend public funds to advance an essentially private point of view by its very nature is political and, in a democracy, more appropriately made by the elected representatives of the people. All interested individuals can claim, with utmost sincerity, to represent the "public." Some selection among potential intervenors becomes necessary, therefore, to assure a fair and balanced presentation of the various viewpoints while insuring, at the same time, that the agency does not exceed its financial constraints. Such choices are particularly unamenable to judicial structuring.

Greene County Planning Board v. *Federal Power Commission*, 559 F.2d 1227, 1240 (2d Cir. 1976) (Kaufman, C.J., concurring). Congress has chosen to withhold the general authority for agencies to make expenditures to aid voluntary intervenors. The decision of the Second Circuit Court of Appeals thus fully effectuates congressional intent and policy on this issue.

CONCLUSION

For the above reasons the Court should deny the petition for certiorari or in the alternative grant summary affirmance to the decision of the Second Circuit Court of Appeals sitting *en banc*.

Respectfully submitted,

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